84-6

No.

IN THE SUPREME COURT
of the
UNITED STATES

SAILOR J. KENNEDY,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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June 15, 1984

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QUESTIONS PRESENTED

1. Does the decision below, by permitting Petitioner to be convicted and punished for making a single statement to consummate a single loan transaction violate the Petitioner's Fifth Amendment right not to be twice placed in jeopardy "for the same offense?"

2. Does the decision below, admittedly in conflict with the decisions of this Court and Ten Other Courts of Appeals, violate the rule against multiplicity by permitting Petitioner to be convicted and punished on three counts for making a single statement to consummate a single loan transaction?

3. Does the decision below approve Petitioner's conviction despite the violation of his right under the Jencks Act to obtain for cross-examination of the key Government witness Government notes of witness interviews?

4. Does the decision below approve Petitioner's conviction despite the unconstitutional curtailment of his cross-examination of the Government's key witness?

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Petitioner Sailor J. Kennedy requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this action on February 22, 1984, which affirmed the judgment of conviction of the United States District Court for the District of Alaska.

The Court below affirmed Petitioner's conviction on

three counts of making a false statement to obtain three counts of violating 18 U.S.C. § 1014. The error of convicting and punishing Petitioner three times is that Petitioner made only one statement regarding pledged security to obtain only one same loan, engaging in only one completed transaction. The multiple prison sentences and fines were supposedly justified by the fact that Petitioner had to complete three sets of documents, but each document was essential to obtaining the loan, so that the submission of any one document alone could not have caused any harmful effect and therefore could not support a separate criminal charge.

Mass confusion presently plagues the federal courts in determining whether a course of conduct constitutes one crime or several. Section 1014 prohibits making a false statement. One court has held that the making of seven separate false statements in one document constituted only one crime, whereas your Petitioner, who made only one statement regarding security but in different documents, was convicted and punished for three crimes. The level of punishment ought not to

depend upon the happenstance of what Circuit the offense was prosecuted.

Moreover, this confusion exists not only with respect to 18 U.S.C. § 1014 and the related false statement statutes commencing with 18 U.S.C. §1001, but with respect to every federal criminal statute in which several acts are necessary to complete the prohibited transaction.

Because some federal courts appear eager to permit prosecutors to splinter a course of conduct to manufacture more than one count in an indictment, in violation of the constitutional prohibition against Double Jeopardy and the rule against multiplicity, the grant of review in this case is urgently needed to establish the rule, which this Court has previously suggested but never firmly anticipated, articulated that each unit of prosecution must be supported by proof of separate facts that result in a separate completed transaction.

If this Court does not grant review of the decision below, then it is probable that where ten copies of a loan application are required to be submitted to a bank, one

copy for each member of the bank's loan committee, the defendant could be convicted of up to ten offenses and imprisoned for twenty years, even though only one false statement was made. Such a ludicrous result would naturally flow from the decision below, but would constitute a radical violation of the intent of Congress simply to prohibit the obtaining a loan on the basis of false statements. A single conviction and sentence is all that the Double Jeopardy Clause and the rule against multiplicity permit for such a circumstance, and this Court should review the decision below to make that crystal clear.

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 726 F.2d 546 (9th Cir. 1984), is reprinted in the appendix hereto at 1a. The unpublished memorandum decision of the Ninth Circuit is reprinted in the appendix hereto at 7a.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on February 22, 1984. A petition for rehearing was denied on April 17, 1984. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

This case arises through a misunderstanding by a bank of certain loan documents originated by the Petitioner. Toledo Mortgage Company, a predecessor to Petitioner's Kennecorp, was the owner of certain apartments in St. Mary's, Ohio, and had a 1976 loan from Border City Savings & Loan Association secured by a first mortgage against that property (Exhibit 13).

In 1976, according to uncontradicted testimony by Earl Weidner, a prosecution witness, Petitioner on behalf of Kennecorp entered into an agreement with Mr. and Mrs. Weidner whereby the Weidners would purchase the apartments subject to certain conditions to be fulfilled in the future, including certain occupancy minimums. In anticipation of the completion of this agreement, Mr.

Weidner executed a mortgage, similar to the document submitted by the government as Exhibit 2-A, whereby Mr. Weidner would become a borrower from Kennecorp upon his purchase of the apartments from Kennecorp.

This mortgage, of course, was not recorded in 1976 and was not to be recorded until Mr. Weidner was satisfied that the apartments met his conditions and completed the purchase.

Meanwhile, in September and October 1978, Petitioner give to Mike Weis, a future employee of the First National Bank of Fairbanks, and the key Government witness, several loan packages for the bank to review for its own participation as a lender. The mortgage to be created with the Weidners and their corporation to be formed, Apartment World, was one of the packages. The bank declined to participate in any of the loans submitted, but chose to extend Petitioner a line of credit so that he could act as the bank's agent in the lower 48 states for the warehousing of loans and to generate loan participations.

As security for the line of credit, at the bank's

suggestion, Mr. Kennedy pledged his interest — a contingent future interest — in the Weidner mortgage to be created.

Several years later, after the relationship deteriorated between the bank and Petitioner, the bank took the position that Petitioner falsely represented to the bank that his security was a present, recorded first mortgage in his favor, which patently on its face it was not, and no document signed by Petitioner states that it was.

Petitioner was indicted, convicted and sentenced separately for three counts of violating 18 U.S.C. §1014. The indictment, reprinted in the appendix hereto, recites five documents sent by Petitioner to the bank: a letter accepting the line of credit (Count I); an assignment of promissory note, assignment of mortgage and security agreement (Count II); and a collateral note (Count III).

The Ninth Circuit Court of Appeals, with jurisdiction under 28 U.S.C. §1291, affirmed Petitioner's convictions in a brief opinion that gives the most superficial treatment to the perplexing problem of Double Jeopardy

and multiplicity present in this case. Under the Opinion below, Petitioner could have been sentenced five times for making the same statement in the five documents required by the bank to complete the loan transaction, for a total of ten years imprisonment, even though only one harm sought to be prevented by the statute would have occurred, and in sharp conflict with the single two-year sentence that Petitioner would have received in any of ten other Circuits in the nation.

REASONS FOR GRANTING THE WRIT

Petitioner objects strenuously to the imposition upon him of more than one punishment. The judgment, reprinted in the appendix hereto, imposed on Count I a sentence of two years imprisonment and $5,000 fine. The sentence on Counts II and III was two years imprisonment on each count, to run concurrently with each other and consecutively to the sentence of imprisonment on Count I, plus a $5,000 fine on Count II. Although the sentences on Counts II and III were suspended, they could be reimposed at any time within the five years probation

imposed by the District Court. Petitioner is entitled to relief from these additional sentences under the Double Jeopardy Clause of the Fifth Amendment and under the rule against multiplicity of charges for one course of conduct that leads to one completed transaction.

Moreover, Petitioner is entitled to relief from the judgment of conviction on all counts because his right to obtain and review interview materials pertaining to key Government witness Mike Weis was blatantly violated and his constitutional right to fully cross-examine key Government witness Mike Weis was denied.

I

THE MULTIPLE PUNISHMENTS VIOLATED THE DOUBLE JEOPARY CLAUSE OF THE FIFTH AMENDMENT BECAUSE YOUR PETITIONER MADE ONLY ONE STATEMENT TO OBTAIN ONLY ONE LOAN, ENGAGING IN ONLY ONE COMPLETED TRANSACTION.

The Double Jeopardy Clause of the Fifth Amendment provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." Among other guarantees, the Double Jeopardy Clause "protects against multiple punishments for the same

offense." North Carolina v. Pearce, 395 U.S. 711, 171 (1969).

Mr. Kennedy's right to be protected from multiple punishments for the same offense was violated when the District Court imposed on Mr. Kennedy two years imprisonment on each count and a fine of $5,000 on Counts I and II, with the sentences of imprisonment on Counts II and III to run concurrently with each other and consecutively with the sentence of imprisonment for Count I. The sentences on Counts II and III were suspended and Mr. Kennedy was placed on probation for five (5) years to commence upon his release from prison on Count I. ER 70 and 83.

The unconstitutionality of Mr. Kennedy's multiple punishments is apparent from this Court's recent decision in Brown v. Ohio, 431 U.S. 161 (1977). The defendant pled guilty to the charge of joyriding on December 8, 1973. Thereafter he was charged with auto theft with respect to events on November 29, 1983 and pleaded guilty. Because joyriding was a lesser included offense within the charge of auto theft, this Court ruled that the

defendant could not be twice punished for the two similar offenses.

If this Court considered joyriding and auto theft to be the "same" offense in Brown, surely the submission of several documents that make the same false statement regarding security to obtain the same loan, constitutes the "same offense," permitting only a single punishment of Mr. Kennedy.

In Brown, this Court cited with approval In re Nielsen, 131 U.S. 176 (1889), which held that a Mormon convicted of cohabiting with two wives for two and one-half years could not be prosecuted for adultery with one of them on the day following the end of that period. That decision also shows that Mr. Kennedy's multiple punishments for making the same false statement to obtain the same loan is a violation of the Double Jeopardy Clause.

In Illinois v. Vitale, 447 U.S. 410 (1980), this Court held that a driver could not constitutionally be punished for (1) failing to reduce speed to avoid a collision and thereafter (2) for manslaughter if the acts in question were, according to state law, the same. There can be no

question that the statements regarding a first mortgage security for which Mr. Kennedy was subjected to triple punishments were the same. Therefore his multiple punishments cannot stand.

In Harris v. Oklahoma, 433 U.S. 682 (1977), this Court held that a defendant could not, under the Double Jeopardy Clause, be convicted for felony-murder in an armed robbery and thereafter be punished for robbery arising from the same incident. Yet Mr. Kennedy has been subjected to multiple punishments for making the same statement to obtain the same loan. These multiple punishments were forbidden by this Court in Harris.

The Double Jeopardy Clause permits only multiple harmful acts to be subject to multiple punishments. This Court stated in Albernaz v. United States, 430 U.S. 333 (1981), at page 343:

> "Importation" and "distribution" of marihuana impose diverse societal harms, and, . . . Congress has in effect determined that a conspiracy to import drugs and to distribute them is twice as serious as a conspiracy to do either object singly. (emphasis added)

Multiple punishments were therefore permitted in

Albernaz under the Double Jeopardy Clause because separate punishment was appropriate for the causation of separate societal harms. However, Mr. Kennedy obtained only one loan, on the basis of only one statement (albeit repeated in several documents) and therefore caused only one societal harm. Consequently, under the Double Jeopardy Clause Mr. Kennedy should be subject to only one punishment.

The question whether Mr. Kennedy's multiple prison sentences and fines and probation of five years violate the Double Jeopardy Clause of the United States Constitution is an important question of law and the Ninth Circuit's published Opinion conflicts with the five decisions of this Court discussed above. This Petition should be granted to resolve this conflict.

II

THE MULTIPLE PUNISHMENTS IMPOSED ON PETITIONER VIOLATED THE RULE AGAINST MULTIPLICITY.

The three count indictment charged Mr. Kennedy with making the same statement regarding security for a

loan in five separate documents for the purpose of influencing the First National Bank of Fairbanks with respect to a single loan. The bank required each document to obtain the loan. The published Opinion affirming Mr. Kennedy's three convictions and multiple punishments on each count (1) violates controlling Supreme Court decisions, (2) conflicts with other decisions of the Ninth Circuit, and (3) sets the Ninth Circuit at odds with ten other Circuit Courts of Appeals. A hearing by this Court is required to resolve these conflicts.

A. The Opinion Conflicts with Controlling Supreme Court Decisions.

Although in a literal sense proof of each document containing an alleged false statement could constitute proof of a different fact, this Court has repeatedly rejected such a mechanical method for determining whether one offense or multiple offenses have been committed. Under the decisions of this Court, Mr. Kennedy is entitled to the vacating of his suspended prison sentence and probation on Counts II and III and to a

remand for resentencing on Court I.

Although the Opinion below quotes Blockburger v. United States, 284 U.S. 299, 304 (1932) for applying the "proof of facts" test, Blockburger contained an additional requirement for the proof of facts test which compels the reversal of Mr. Kennedy's multiplicitous convictions: that the transaction be concluded by each act upon which a charge is based.

In Blockburger, multiple completed sales of a drug, each in violation of the federal law requiring sale in the original stamped package, supported multiple counts, one for each completed sale, because:

> In the present case, the first transaction resulting in a sale, had come to an end. The next sale was not the result of the original impulse, but of a fresh one — that is to say, of a new bargain. 234 U.S. at 303.

In the instant case, however, the transaction had not "come to an end" when Mr. Kennedy wrote his letter accepting the line of credit on October 4, 1978 (the basis for Count I). The transaction had just commenced. The assignment of note, assignment of mortgage and security agreement (Count II) and the collateral note (Count III)

each had to be completed by Mr. Kennedy before the bank would disburse any funds on the line of credit. The three counts are premised simply on a repetition of the same statement regarding security for the same loan, not on separate transactions for three different loans. Blockburger therefore compels a reversal of the convictions on Counts II and III and a remand for resentencing because Mr. Kennedy engaged in only one completed transaction.

Other decisions of this Court prohibit multiple punishments for multiple acts in a single transaction:

In United States v. Gaddis, 424 U.S. 544 (1976) a bank robber could not be convicted of both robbing the bank and possession of the loot from the robbery, although each offense would require "proof of different facts" — (1) the robbery and (2) possession of the proceeds after they had been taken from the bank.

In Prince v. United States, 352 U.S. 322 (1956) this Court permitted only a single punishment for various acts during a bank robbery that could have been charged as two counts for taking money by force and for assault

under 18 U.S.C. 2113(a) and (b).

The shooting of two federal officers by the single discharge of a gun supports only one conviction and punishment under a statute prohibiting an assault on a federal officer. 18 U.S.C. § 254. Ladner v. United States, 358 U.S. 169 (1958):

> [A]n interpretation that there are as many assaults committed as there are officers affected would produce incongruous results. Punishments totally disproportionate to the act of assault could be imposed because it will often be the case that the number of officers affected will have little bearing upon the seriousness of the criminal act. 358 U.S. at 177. (emphasis added)

The number of documents submitted by Petitioner, "will have little bearing on the seriousness of the criminal act." Each document made the same reference to the same first mortgage as security for the same loan. The seriousness of the criminal act under Section 1014 is to be gauged by the number of loans applied for, which measure the threat to the integrity of the federally insured financial institution. Therefore, the "incongruous" result of punishing Mr. Kennedy multiple

times for submitting the same statement to obtain the same loan must be avoided by reversing his convictions on Counts II and III and remanding for resentencing.

In the following cases this Court prohibited multiple counts although under mechanical application of the "proof of facts" test, in the Opinion below, multiple punishments could have been imposed:

Bell v. United States, 349 U.S. 31 (1955) (transporting two women across state lines in a single vehicle constitutes one offense); United States v. Universal C.I.T. Credit Corp., 344 U.S. 218 (1952) (employing an employee in excess of 40 hours per week constitutes only one offense regardless of the number of weeks because the multiple acts arise from a single "impulse."); Ex Parte Snow, 120 U.S. 274 (1887) (cohabiting with more than one woman for several years is one offense, even though each year would constitute a different fact.)

The Opinion below cannot be squared with these decisions of this Court, which look to the single intention of the defendant and to the harm to be prevented by the statute in determining that multiple acts may be punished

only once. Mr. Kennedy had a single intention to obtain a loan, and his multiple documents, each required by the bank, made the same statement to complete one loan transaction that jeopardized the federally insured institution only once. Mr. Kennedy should not have been convicted and punished for more than one offense.

B. The Opinion Conflicts With Other Opinions of The Ninth Circuit Court of Appeals.

Only one count is permitted for possession of cocaine with intent to distribute and distribution of the same cocaine. U.S. v. Ray, 731 F.2d 1369 (9th Cir. 1984).

Only one count is permitted for the failure to declare currency and for falsely denying possession of currency. U.S. v. Woodward, 726 F.2d 1320 (9th Cir. 1983).

In contrast to the Opinion below, the making of two separate false statements to purchase a firearm constitutes only one offense, permitting only one count under the "rule of lenity." Brown v. United States, 623 F.2d 54 (9th Cir. 1980). Receiving three firearms from

interstate commerce and being a felon in possession of the same three firearms constitutes only one offense, not six. United States v. Conn, 716 F.2d 550 (9th Cir. 1983).

In United States v. Markee, 425 F.2d 1043 (9th Cir. 1970), the Ninth Circuit upheld a conviction on one count of violation 18 U.S.C. § 1004 (false statements to the FHA) where the defendants made false representations in two separate documents, a sales report and an accountant's financial statement. As in the instant case, "both documents contained essentially the same false information." 425 F.2d at 1047. This Court ruled that the indictment, referring to the two documents:

> set forth with particularity all of the essential facts necessary to constitute an offense under 18 U.S.C. Section 1001 . . . . [I]t was the preparation of these records with the intent that they be used to deceive the FHA which constituted the essential element of the crime charge. 425 F.2d at 1048.

The Ninth Circuit has affirmed a conviction of one count of false statements under 18 U.S.C. § 1001 where the defendant has made multiple "false responses to a routine series of questions by the border agent." United States v. Rose, 570 F.2d 1358, 1360 (9th Cir. 1978). If

the Ninth Circuit had followed its own ruling in Rose, then your Petitioner's convictions on Counts II and III should have been reversed because the statements on which those counts were based simply repeat the information on which Court I was based.

The opinion squarely conflicts with United States v. Saunders, 641 F.2d 659 (9th Cir.), cert. denied, 452 U.S. 918 (1981), holding that multiple crossing of the state line supports a single count indictment because the crossings were part of a single transaction or "constituted one trip." 641 F.2d at 665.

Only multiple false statements that lead to multiple completed transactions can support multiple counts. In United States v. Williams, 685 F.2d 319 (9th Cir. 1982), seven false statements submitted to obtain seven guns supported seven counts:

> When a false statement is made in the acquisition of each of two weapons bought at one time, there are two offenses. [citation] Williams made a false statement in connection with each gun and was, therefore, correctly indicted on seven counts. 685 F.2d at 321.

In United States v. Faleafine, 492 F.2d 18 (9th Cir.

1974), the Ninth Circuit struck multiple counts of assault and kidnapping in connection with a bank robbery even though the two separate counts required the proof of different facts and would have passed muster under the mechanical rule embraced by this panel in the instant case. The Ninth Circuit Court in Faleafine was guided by the rule of Bell v. United States, 349 U.S. 81, 83-84 (1955) that "doubt will be resolved against turning a single transaction into multiple offenses."

Under the "proof of facts" test as applied in the Opinion below, United States v. Corbin Farm Serv., 578 F.2d 259 (9th Cir. 1978), was wrongly decided. Although the death of each protected migratory bird constitutes a "different fact," in Corbin Farm Service the Ninth Circuit ruled that the death of ten birds could support only one count.

A defendant may not be convicted of both robbery and retaining the proceeds from the robbery, although obviously the two offenses would require proof of different facts. United States v. O'Neil 436 F.2d 571 (9th Cir. 1970).

Because the Opinion in this case cannot be squared with the Ninth Circuit decisions just cited, this Court is urged to grant the Petition for Certiorari.

C. The Opinion Conflicts With Ten Other Circuit Courts of Appeals.

First Circuit: United States v. Canas, 595 F.2d 73 (1st Cir. 1979) (six documents containing false statements to obtain one loan supports one count). Canas was cited to the Ninth Circuit, but the Opinion fails to mention, let alone distinguish it.

Third Circuit: United States v. Sheeran, 699 F.2d 112 (3rd Cir. 1983) (separate counts only for acts that resulted in the defendant's receipt of separate "things of value.")

Fourth Circuit: United States v. Mason, 611 F.2d 49 (4th Cir. 1979) (false statements in three documents to obtain three firearms support only one count).

Fifth Circuit: United States v. Howell, 719 F.2d 1258 (5th Cir. 1983) (oral threat on President's life followed by

written threat the next day supports only one count), and United States v. Sahley, 526 F.2d 913 (5th Cir. 1976) (only one count permitted for multiple false statements in a single document.) The Opinion's attempt to distinguish Sahley on the grounds that in Sahley the multiple false statements were contained in a single document, is, to put it politely, totally unconvincing. Does a single document pose a lesser threat to federally insured financial institutions? Congress did not define the unit of prosecution in Section 1014 as a piece of paper. The Opinion below is not supported by United States v. Miranne, 688 F.2d 980 (5th Cir. 1982) in which multiple counts were permitted, one count for each loan applied for.

Sixth Circuit: United States v. Reed, 647 F.2d 678 (6th Cir. 1981) (receipt of stolen property from two persons and transportation of that property across state lines constitutes only one offense.); United States v. Jones, 533 F.2d 1387 (6th Cir. 1976), cert. denied, 431 U.S. 964 (1977) (felon's possession of a firearm on three separate occasions constitutes only one offense); United

States v. Rosenbarger, 536 F.2d 715 (6th Cir. 1976) cert. denied, 431 U.S. 965 (1977) (possession of three firearms by convicted felon constitutes only one offense).

Seventh Circuit: United States v. Fleming, 504 F.2d 1045 (7th Cir. 1974) (taking money from different bank tellers supports only one count for bank robbery).

Eighth Circuit: United States v. Sue, 586 F.2d 70 (8th Cir. 1978) (several false statements for one loan constitutes one offense). This Opinion's attempted distinction of Sue because only one document was there involved is totally unconvincing, a distinction without a difference.

Tenth Circuit: United States v. Valentine, 706 F.2d 282 (10th Cir. 1983) (possession of multiple firearms constitutes only one offense).

Eleventh Circuit: United States v. Pullen, 721 F.2d 788 (11th Cir. 1983) (false statements to obtain financing for motor vehicles supports one count per vehicle, not per false statement). The Opinion cannot rely upon United States v. Glanton, 707 F.2d 1238 (11th Cir. 1983) because the defendant's conduct in passing forged checks did not

constitute an offense under Section 1014. Williams v. United States, ____ U.S. ___ 102 S.Ct. 3088 (1982).

District of Columbia Circuit: United States v. Mangieri, 694 F.2d 1270, 1282 (D.C. Cir. 1982) (multiple false statements properly charged in one count per loan to avoid "danger of inappropriate multiple punishments for a single criminal episode"); United States v. Leek, 665 F.2d 383, 388 (D.C. Cir. 1981) ("fragmentation of a single course of conduct . . . to multiply convictions and enhance punishment is impermissible.")

These decisions from ten other Circuit Courts of Appeals carry, not only the greater weight of authority, but also the sounder reasoning, embodying the common law principle that the definition of a crime depends, not only upon the wrongdoer's act or omissions, but also upon the consequences. R. Perkins, Criminal Law 8 (2d ed 1969). This Petition for Certiorari raises a pressing question regarding the imposition of multiple punishments for a single transaction. This Court should therefore grant the Petition to resolve this question.

III

PETITIONER'S CONVICTIONS REST UPON THE VIOLATION OF HIS RIGHTS UNDER THE JENCKS ACT.

In Petitioner's Supplemental Brief in the Court below, the Ninth Circuit was advised that the convictions were obtained in violation of his rights under the Jencks Act. 18 U.S.C. § 3500. The Ninth Circuit responded in its Memorandum, without analysis, that the "issues . . . lack merit." Such a disposition is astonishing in light of the clear violation of the Jencks Act as shown by the following facts:

1. Petitioner made a timely motion to obtain all Jencks Act materials. RT 38-15-21.

2. Mr. Cooper, the prosecuting attorney, interviewed the key Government witness, Mike Weis, and made notes of his interview with Mr. Weis. RT 244:4-11.

3. The FBI interviewed the key Government witness on two occasions. RT 284:11.

4. The trial judge did not review the prosecutor's notes nor the FBI agents' notes to determine their producibility under the Jencks Act.

5. Neither the prosecuting attorney's trial notes nor the FBI agents' field interview notes were produced for Petitioner.

Petitioner's inability to impeach Mike Weis with the notes of interviews made by the prosecuting attorney or the FBI rendered the trial enormously unfair and violated the following decisions of this Court and the Ninth Circuit:

Goldberg v. United States, 425 U.S. 94 (1976) (notes by government attorney are producible under Jencks Act);

United States v. Long, 715 F.2d 1364 (9th Cir. 1983) (District Court must review documents to determine their producibility);

United States v. Harris, 543 F.2d 1247 (9th Cir. 1976) (defendant entitled to agent's rough notes under Jencks Act);

United States v. Johnson, 521 F.2d 1318 (9th Cir. 1975) (District Court must compel production of agent's notes to determine whether they constitute producible statements under Jencks Act);

United States v. Ogden, 303 F.2d 724 (9th Cir. 1962) (hearing required to determine whether document constitutes a producible statement, even in absence of a demand by defense counsel).

See also U.S. v. Sorrentino, 726 F.2d 876 (1st Cir. 1984), in which the case was remanded because of the District Court's failure to compel production of the FBI agent's report.

The Memorandum's failure to acknowledge the facts and law recited above invite this Court's review to compel adherence to Goldberg by ordering the District Court's determination required under the Jencks Act. If the suppressed materials were beneficial to Mr. Kennedy, then he is entitled to a new trial or an acquital.

IV
PETITIONER'S CROSS-EXAMINATION OF KEY PROSECUTION WITNESS MIKE WEIS WAS UNCONSTITUTIONALLY CURTAILED

Although Petitioner's conviction rested entirely on documents provided by the bank, Petitioner was not permitted to cross-examine the key prosecution witness,

Mike Weis, a former bank employee, to create a reasonable doubt as to the reliability of the documents introduced against Mr. Kennedy. For example, Petitioner was barred from cross-examining Mike Weis to establish:

1. That the bank had destroyed documents related to this transaction in order to obtain payments from an insurance company on a fidelity bond, RT 375:8-14;

2. That Mr. Weis had a motive to cooperate with the bank in this prosecution of Petitioner to avoid Mr. Weis' own criminal indictment, RT 376:18-24;

3. That Mr. Weis had a motive to cooperate with the bank in prosecuting Petitioner to reduce the chances that the bonding company would go after Mr. Weis, RT 377:6;

4. That Mr. Weis had a motive to cooperate with the bank in prosecuting Petitioner to reduce the risk to Mike Weis' career as a C.P.A., RT 377:8;

5. That it was the bank's practice to "torpedo" documents that did not suit the bank's self interest, RT 378-383.

The District Court ruling barring cross-examination to elicit these facts, RT 384:8, deprived the jury of "sufficient information" on these topics, in violation of Chipman v. Mercer, 628 F.2d 528, 530 (9th Cir. 1980).

Before the instant case, the Ninth Circuit had "repeatedly insisted that wide latitude be given to defendants in their cross-examination of key prosecution witnesses." United States v. Uramoto, 638 F.2d 84, 86 (9th Cir. 1980). The latitude of cross-examination extends not only to the conduct of the witness but also to the conduct of others. United States v. Miranda, 510 F.2d 385 (9th Cir. 1975). Where the Government sought to prove that the defendants had a key to a cabinet providing him an opportunity to steal, the trial court was required under the Sixth Amendment to permit cross-examination of prosecution witnesses as to access by other employees to the keys to the cabinet.

Moreover, this Court has stated that "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested," so that when the scope of cross-examination

is unconstitutionally limited, "no amount of showing of want of prejudice will cure it." Davis v. Alaska, 415 U.S. 308, 316-317, 318 (1974).

Therefore the Petition should be granted because Petitioner's cross-examination of Mike Weis was unconstitutionally curtailed.

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

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June 15, 1984

Appendix

In the United States Court of Appeals
For the Ninth Circuit
No. 83-3048
United States of America,
Plaintiff-Appellee,
v.
Sailor J. Kennedy,
Defendant-Appellant

Appeal from the United States District Court
For the District of Alaska

Argued January 3, 1984
Submitted January 17, 1984
Decided February 22, 1984

OPINION

Before: WRIGHT, TANG and ALARCON,
Circuit Judges.
WRIGHT: Circuit Judge.

Kennedy was convicted on three counts of making false statements to a federally insured bank under 18 U.S.C. § 1014. There are two substantial questions:[1] (1)

whether the indictment was multiplicitous because it charged three violations of Section 1014 when all statements were made to obtain a single loan; and (2) whether it was duplicitous because it allowed conviction on Count II for statements made in several separate documents.

FACTS

Kennedy is a mortgage broker. He was convicted of obtaining a $350,000 line of credit from the First National Bank of Fairbanks by falsely representing that a nonexistent mortgage and note were a valid subsisting first loan.

Court I alleged that Kennedy stated that he would assign a valid mortgage and note to the bank in return for the line of credit. The proof showed that the "mortgage and note" was merely a proposed transaction. Based on this misrepresentation, the bank advanced the line of

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1 Kennedy's other points on appeal do not require discussion in a published opinion. They will be considered in an unpublished memorandum. Ninth Circuit Rule 21.

credit.

Count II alleged that Kennedy assigned a promissory note and a mortgage, and executed a security agreement regarding the same property involved in Count I. These three documents initiated disbursements of funds from the line of credit.

Count III charged Kennedy with executing a collateral note, binding himself to repay the $350,000 line of credit from the bank, and repeating the fictitious description of the "mortgage and note." The collateral note maintained the flow of payments from the line of credit.

Before trial, Kennedy moved to dismiss and to require the prosecution to elect counts. A magistrate denied the motion. Kennedy was convicted on all counts.

ANALYSIS

A. Multiplicity

We review the denial of a motion to require an election of counts for abuse of discretion. United States v. Wasserteil, 641 F.2d 704, 709 (9th Cir. 1981). There is

"no bright line . . . dividing charges comprising a single offense from those comprising separate and distinct offenses." United States v. UCO Oil Co., 546 F.2d 833, 835 (9th Cir. 1976), cert. denied, 430 U.S. 966 (1977) (footnote omitted).

Kennedy contends that his conviction on three counts resulted from an impermissible splintering within the indictment of facts constituting a single offense. He claims that the indictment was multiplicitous because all documents submitted to the bank repeated the same false statement, and they were all executed for a single purpose: to obtain the $350,000 line of credit.

We have not previously decided whether 18 U.S.C. § 1014 allows multiple convictions for separate documents submitted to obtain a single loan. The Fifth and the Eleventh Circuits, however, have rejected Kennedy's argument. United States v. Glanton, 707 F.2d 1238 (11th Cir. 1983); United States v. Miranne, 688 F.2d 980 (5th Cir. 1982), cert. denied, 103 S. Ct. 736 (1983); United States v. Bins, 311 F.2d 390 (5th Cir.), cert. denied, 379 U.S. 880 (1964).

In Glanton, the court upheld a conviction on three counts of violating Section 1014 arising out of repetitions of the same false statement in three separate documents. 707 F.2d at 1239. The court applied the traditional test which determines whether each count "requires proof of a fact which the other does not." Id. at 1240 (quoting Blockburger v. United States, 284 U.S. 299, 304 (1932)).

We agree with this reasoning. The "proof of facts" test is well established in the law of this circuit. See United States v. Bosque, 691 F.2d 866, 869 (9th Cir. 1982); United States v. Sanford, 673 F.2d 1070, 1073 (9th Cir. 1982); United States v. Moore, 653 F.2d 384, 390-91 (9th Cir.), cert. denied, 454 U.S. 1102 (1981).

In Moore, for instance, the defendant was convicted on three counts of violating 18 U.S.C. § 201(e) by soliciting money in exchange for promising not to testify. Each count was based on a separate phone call, but two of the calls were made to the same person and repeated the same offer. We rejected Moore's claim that the counts were multiplicitous, saying:

> [B]ecause each call . . . requires proof distinct from the other . . . the calls do not constitute a single, continuing violation. Appellant's purpose in making the calls, it is true, was constant; but it does not follow that each attempt "to market" his testimony must be considered a single transaction.

653 F.2d at 391.

Under this test, separate sentences may be imposed for each false document or set of false documents submitted to the bank. This approach is consistent with Section 1014's language. The statute prohibits knowingly making any false statement to a bank. It is the false statement, not the anticipated loan, which defines the crime. See UCO Oil, 546 F.2d at 838-39. We distinguish those cases where courts have refused to impose multiple punishment for several "statements" contained within a single document. See United States v. Sue, 586 F.2d 70 (8th Cir. 1978); United States v. Sahley, 526 F.2d 913, 918 (5th Cir. 1976). See also UCO Oil, 546 F.2d at 838.

B. Duplicity

Kennedy also claims that Count II is defective because it alleges that he made false statements in

three separate documents.

Kennedy failed to bring this to the attention of the trial court. He must show that allowing the Count to go to the jury was "plain error." Fed. R. Crim. P. 52(b).

Plain error is "highly prejudicial error affecting substantial rights." United States v. Gilman, 684 F.2d 616, 620 (9th Cir. 1982). We will reverse for plain error only in exceptional circumstances. Id.

There was no plain error here. The three documents involved were submitted as a package to initiate disbursements from the bank's line of credit. Count II charged these documents in the conjunctive and the court's instructions clearly required the jury to find that each false statement was made in the manner alleged in order to convict. There was no danger that the jury could convict on Count II without reaching unanimous agreement on a given set of facts. Cf. United States v. Carman, 577 F.2d 556 (9th Cir. 1978); UCO Oil, 546 F.2d at 835.

AFFIRMED. The mandate shall issue now.

In the United States Court of Appeals
For the Ninth Circuit
No. 83-3048
United States of America,
Plaintiff-Appellee,
v.
Sailor J. Kennedy,
Defendant-Appellant
Appeal from the United States District Court
For the District of Alaska
Argued January 3, 1984
Submitted January 17, 1984
Decided February 22, 1984

MEMORANDUM

Before: WRIGHT, TANG and ALARCON,
Circuit Judges.

Kennedy appeals his conviction on three counts of making false statements to a bank under 18 U.S.C. § 1014. We have filed a published opinion which discusses the only issues that merit extended consideration. This memorandum addresses the remaining contentions.

(1) The court properly denied Kennedy's motion for acquittal. In reviewing this denial, we ask "whether the evidence, considered most favorably to the government, was such as to permit a rational conclusion by the jury that the accused was guilty beyond a reasonable doubt." United States v. Nelson, 419 F.2d 1237, 1242 (9th Cir. 1969). The evidence was sufficient to allow the jury rationally to conclude that Kennedy intentionally misrepresented the nature of his interest in the Townview Terrace Apartments.

(2) We will not reverse the trial court's denial of a continuance absent a clear abuse of discretion. United States v. Barrett, 703 F.2d 1076, 1081 (9th Cir. 1983). There was no abuse of discretion. Kennedy failed to make a timely motion for the documents examiner. See United States v. Valtierra, 467 F.2d 125, 126 (9th Cir. 1972).

(3) The court did not abuse its discretion by denying Kennedy's request for witness subpoenas under Fed. R. Crim. P. 17(b). Kennedy failed to make any satisfactory showing "that the presence of the

witness[es] [was] necessary to an adequate defense." United States v. Crenshaw, 698 F.2d 1060, 1066 (9th Cir. 1983); Wagner v. United States, 416 F.2d 558, 564 (9th Cir. 1969), cert. denied, 397 U.S. 923, 1015, 399 U.S. 915 (1970).

(4) The court did not abuse its discretion by rejecting Kennedy's motion to change venue to Ohio. Under 18 U.S.C. § 1014, proper venue is where the offense was complete upon receipt of false statements by the bank. United States v. Zwego, 657 F.2d 248, 251 (10th Cir. 1981), cert. denied, 455 U.S. 919 (1982). Kennedy failed to show facts to compel a change of venue. See United States v. Hunter, 672 F.2d 815, 816 (10th Cir. 1982).

(5) The Court did not abuse its discretion by excluding a portion of Kennedy's proffered cross-examination of the prosecution's key witness, Weis. See United States v. Bleckner, 601 F.2d 382, 385 (9th Cir. 1979). The cross-examination of Weis was vigorous and sustained, satisfying the demands of the confrontation clause. See United States v. DeLuca, 692 F.2d 1277,

1282 (9th Cir. 1982).

The proffered cross-examination did not directly relate to Weis's credibility and could have misled and diverted the jury. The court properly excluded it.

(6) Kennedy raised two issues in a supplemental brief filed the week before oral argument. These issues were not raised in a timely fashion. They violate the command of Fed. R. App. P. 28(a)(2) that the opening brief shall contain "[a] statement of the issues presented for review." See United States v. Sherwin, 539 F.2d 1, 5 n.4 (9th Cir. 1976); Helms v. United States, 340 F.2d 15 (5th Cir.), cert. denied, 382 U.S. 814 (1964).

We have nevertheless considered the issues raised in the supplemental brief and deem them to lack merit.

The judgment is AFFIRMED. The mandate shall issue now.

In the United States Court of Appeals
For the Ninth Circuit
No. 83-3048
United States of America,
Plaintiff-Appellee,
v.
Sailor J. Kennedy,
Defendant-Appellant

ORDER

Before: WRIGHT, TANG, and ALARCON
Circuit Judges

The panel as constituted in the above case has voted to deny the petiton for rehearing. Judges Tang and Alarcon have voted to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

In the United States Court of Appeals
For the Ninth Circuit
No. 83-3048
United States of America,
Plaintiff-Appellee,
v.
Sailor J. Kennedy,
Defendant-Appellant

ORDER

Before Wright, Tang and Alarcon, Circuit Judges. Appellant's en banc request for certification of questions of law to the Supreme Court is denied.

Filed: June 12, 1984.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA
F82-106 CR

UNITED STATES OF AMERICA vs.
SAILOR J. KENNEDY

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date, April 18, 1983, with counsel Frank A. Justin and Frank S. Koziol, Jr.

There being a verdict of guilty, defendant has been convicted as charged of the offense(s) of false statements to obtain line of credit, in violation of Title 18, U.S.C., Section 1014, as charged in Counts I, II and III of the indictment.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, he court adjudged the defendant guilty as charged and convicted and ordered that: The defendant

is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of two (2) years on each of Counts I, II, and III, and fined $5,000.00 on each of Counts I and II. Said sentence of imprisonment on Counts II and III are to run concurrently with each other and consecutively with sentence of imprisonment on Count I.

IT IS FURTHER ADJUDGED that the execution of said sentence on Counts II and III are hereby suspended and defendant placed on probation for a period of five (5) years, to commence upon the defendant's release from confinement, upon the usual terms and conditions and upon the following terms and conditions:

1. That he make restitution in the amount obtained from the bank;

2. That he made disclosure in full to the Probation Officer.

The court orders commitment to the custody of the Attorney General and recommends,

A. All interest which he holds in any corporation

or business association which he controls or directs;

B. Ownership in any corporation or business association over $5,000.00;

C. All loans which he has over $5,000.00 and any corporation or business association in which he has over a $5,000.00 loss or obligation.

D. All assets of any corporation or business association he is involved in of $5,000.00 or more.

Signed by James M. Fitzgerald

United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	3 COUNTS - FALSE STATEMENT TO OBTAIN LINE OF CREDIT
	)	
v.	)	Violation of 18 USC 1014
	)	
SAILOR J. KENNEDY,	)	INDICTMENT
	)	
Defendant,	)	CR. No. F82-106
	)	

THE GRAND JURY CHARGES:

COUNT I

That on or about the 4th day of October, 1978, at Fairbanks, in the District of Alaska, and elsewhere, Sailor J. Kennedy did unlawfully and knowingly make a false statement of material fact for the purpose of influencing the action of the First National Bank of Fairbanks, the deposits of which are insured by the Federal Deposit Insurance Corporation, upon a commitment for a $350,000 line of credit, in that the said Sailor J. Kennedy did state and cause to be stated to the Bank that a valid mortgage and note would be assigned to the Bank to secure such line of credit, whereas in truth and in fact, as the

defendant then and there well knew, the purported mortgage and note were fictitious and worthless, all of which is contrary to and in violation of Title 18, United States Code, §1014.

COUNT II

That on or about the 11th day of October, 1978, at Fairbanks, in the District of Alaska, and elsewhere, Sailor J. Kennedy did unlawfully and knowingly make a false statement of material fact for the purpose of influencing the action of the First National Bank of Fairbanks, the deposits of which are insured by the Federal Deposit Insurance Corporation, upon a commitment for a $350,000 line of credit, in that the said Sailor J. Kennedy executed and caused to be executed in favor of the Bank an Assignment of Promissory Note, an Assignment of Mortgage, and a Security Agreement, which purported to assign to the Bank a mortgage constituting a valid first lien on certain real property, and an amount receivable of $517,950.83, whereas in truth and in fact; as the defendant then and there well knew, said lien and amount receivable were fictitious, worthless and non-existent, all of which is

contrary to and in violation of Title 18, United States Code, §1014.

COUNT III

That on or about the 19th day of October, 1978, at Fairbanks, in the District of Alaska, and elsewhere, Sailor J. Kennedy did unlawfully and knowingly make a false statement of material fact for the purpose of influencing the action of the First National Bank of Fairbanks, the deposits of which are insured by the Federal Deposit Insurance Corporation, upon a commitment for a $350,000 line of credit, in that the said Sailor J. Kennedy executed and caused to be executed a Collateral Note which stated that to secure repayment of the said $350,000 the maker of said Collateral Note had assigned a certain mortgage and note to the Bank, whereas in truth and in fact, as the defendant then and there well knew, the mortgage and note so assigned were fictitious, all of which

is contrary to and in violation of Title 18, United States Code, §1014.

A True Bill

/s/
GRAND JURY FOREMAN

For MICHAEL R. SPAAN
United States Attorney

STEPHEN COOPER
Assistant United States Attorney

DATED: 11/9/82

18 U.S.C. §1014

Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of the Reconstruction Finance Corporation, Farm Credit Administration, Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers' Home Administration, any Federal intermediate credit bank, or any division, officer, or employee thereof, or of any corporation organized under sections 1131-1134m of Title 12, or of any regional agricultural credit corporation established pursuant to law, or of the National Agricultural Credit Corporation, a Federal Home Loan Bank, the Federal Home Loan Bank Board, the Home Owners' Loan Corporation, a Federal Savings and Loan Associaton, a Federal land bank, a joint-stock land bank, a Federal land bank association, a Federal Reserve bank, a small business investment company, a Federal credit union, an insured State-chartered credit union, any institution the accounts of which are insured by the Federal Savings and Loan

Insurance Corporation, any bank the deposits of which are insured by the Federal Deposit Insurance Corporation, any member of the Federal Home Loan Bank System, the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation, or the Administrator of the National Credit Union Administration, upon ay application, advance, discount, purchase, purchase agreement, repurchase agreemnt, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release or substitution of security therefor, shall be fined not more than $5,000 or imprisoned not more than two years, or both.

18 U.S.C. §3500. Demands for production of statements and reports of witnesses

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has tesified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement

ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be

reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement" as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) A written statement made by said witness and signed or otherwise adopted or approved by him;

(2) A stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral

statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

(2)

No. 84-6

In the Supreme Court of the United States

OCTOBER TERM, 1984

SAILOR J. KENNEDY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

STEPHEN S. TROTT
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12 pp

QUESTIONS PRESENTED

1. Whether an indictment charging petitioner with three counts of violating 18 U.S.C. 1014 was multiplicitous, where each count alleged a different false statement.

2. Whether the government withheld from petitioner materials that were producible under the Jencks Act, 18 U.S.C. 3500.

3. Whether the district court abused its discretion in limiting petitioner's cross-examination of a government witness.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-6

SAILOR J. KENNEDY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The published opinion of the court of appeals (Pet. App. 1a-6a) is reported at 726 F.2d 546. The court of appeals also issued an unpublished opinion (Pet. App. 7a-10a).

JURISDICTION

The judgment of the court of appeals was entered on February 22, 1984. A petition for rehearing was denied on June 12, 1984 (Pet. App. 11a-12a). The petition for a writ of certiorari was filed on June 15, 1984. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Alaska, petitioner was convicted on three counts of making a false statement to a federally insured bank, in violation of 18 U.S.C. 1014. Petitioner was sentenced to two years' imprisonment on each of the three

counts, with the sentences on counts 2 and 3 to run concurrently with one another and consecutively to that on count 1. He also was fined $5000 each on counts 1 and 2.[1]

1. The evidence established that petitioner, a mortgage broker, sought a $350,000 line of credit from the First National Bank of Fairbanks. To secure the credit, petitioner offered to assign to the bank a note and mortgage that he purportedly held on an apartment complex in St. Mary's, Ohio. Petitioner represented that the owner and mortgagor of the apartment complex and the obligor on the note was the "Apartment World Corporation" (Tr. 197-203, 213, 215, 219-220). In light of these representations the bank approved the loan to petitioner, and on October 4, 1978, petitioner sent the bank a letter confirming the terms of the transaction (Tr. 224-225, 227-228). The bank thereafter advanced the line of credit (Pet. App. 2a).

On October 11, 1978, petitioner executed and returned to the bank an assignment of the mortgage, describing the mortgage as a "valid, subsisting first lien" on the apartment property (Tr. 228-229). On that same day petitioner assigned to the bank both the "Apartment World" note and a security agreement covering the amount represented by the note (Tr. 230-231). After receiving these documents the bank began disbursing funds from the line of credit (Pet. App. 3a).

On October 19, 1978, petitioner executed a collateral note of his own showing that he owed the bank $350,000, and reciting that the debt was secured by the "Apartment World" mortgage and note (Tr. 237). By executing the note petitioner continued the flow of payments from the line of credit (Pet. App. 3a).

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[1]The sentences on counts 2 and 3 were suspended in favor of five years' probation, provided petitioner complied with certain conditions imposed by the court (Pet. App. 14a-15a).

Some time afterwards the bank discovered that the "Apartment World Corporation" did not exist and that the mortgage and note offered as security by petitioner were fraudulent (Tr. 419-420 & Exh. 12). The St. Mary's apartment complex in fact was owned by petitioner's company and was heavily encumbered with several mortgages and liens held by other individuals and institutions (Tr. 250-251, 406-407).

2. Petitioner was charged with three counts of violating Section 1014. Count 1 identified as a false statement petitioner's October 4 letter (Pet. App. 16a-17a); count 2 listed as false statements the documents executed by petitioner on October 11 (Pet. App. 17a); and count 3 alleged as a false statement petitioner's October 19 declaration that the $350,000 line of credit was secured by the "Apartment World" mortgage and note (Pet. App. 17a-18a). Petitioner was convicted on all counts.

On appeal, petitioner contended, among other things, that the indictment was multiplicitous because all of the documents he had submitted to the bank contained an identical false statement and were designed to obtain one $350,000 line of credit. The court of appeals rejected this argument, however, explaining that "[t]he statute prohibits knowingly making any false *statement* to a bank. It is the false statement, not the anticipated loan, which defines the crime" (Pet. App. 5a (emphasis in original)). In reaching this conclusion, the court of appeals noted similar holdings by the Fifth and Eleventh Circuits. *United States* v. *Glanton*, 707 F.2d 1238 (11th Cir. 1983); *United States* v. *Miranne*, 688 F.2d 980 (5th Cir. 1982), cert. denied, 459 U.S. 1109 (1983).[2]

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[2]In a separate unpublished opinion the court of appeals rejected several of petitioner's other contentions. In particular, the court concluded that the district court did not abuse its discretion in limiting petitioner's cross-examination of a prosecution witness because the

ARGUMENT

1. Petitioner's contention that the indictment was multiplicitous and violated the Double Jeopardy Clause (Pet. 8-21) is without merit. As this Court has indicated, such claims should be resolved by identifying the unit of prosecution created by the legislature. *Missouri* v. *Hunter*, 459 U.S. 359, 366 (1983); *Bell* v. *United States*, 349 U.S. 81 (1955). In this case, as the court of appeals noted, Section 1014 itself defines the proper unit of prosecution as "any false statement or report" made to a federally insured bank. Here, petitioner made three false statements to such a bank at three different times — and each statement led the bank to take a different action.[3] Having each of the statements support a separate count of the indictment therefore satisfies the traditional "test to be applied to determine whether there are two offenses or only one": whether each count "requires proof of a fact which the other does not." *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932).

The court of appeals' holding to this effect is consistent with the conclusions of the other courts that have addressed the scope of Section 1014. Thus in *United States* v. *Glanton, supra*, the Eleventh Circuit held that three counts had been properly charged under Section 1014 when the defendant had forged the same person's name on three different documents. Although each of these forgeries — on a bank signature card, on a check deposited in an account

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proferred cross-examination was misleading (Pet. App. 9a), and that petitioner's allegations of Jencks Act violations were untimely and in any event "lack[ed] merit" (*ibid.*).

[3]"Based on [the October 4] misrepresentation, the bank advanced the line of credit" (Pet. App. 2a); the documents sent to the bank by petitioner on October 11 "initiated disbursements of funds from the line of credit" (Pet. App. 3a); and the "collateral note [executed by petitioner on October 19] maintained the flow of payments from the line of credit" (Pet. App. 3a).

opened by the defendant, and on a counter check withdrawing funds from the account — were successive steps taken in furtherance of one fraud, the court explained that separate counts were permissible because "[e]ach count required the government to prove a different fact." 707 F.2d at 1240.[4] See also *Miranne*, 688 F.2d at 986 (where identical loan applications containing identical false statements were submitted in support of requests for 42 loans, an indictment charging 42 violations under Section 1014 was not multiplicitous because "the unit of prosecution is specifically defined" in Section 1014 as " 'any false statement or report' ").

Despite petitioner's assertion to the contrary, no conflict on this issue exists among the courts of appeals. The Section 1014 opinions cited by petitioner as dismissing multiple-count indictments did not address repeated, independent fraudulent statements, as does this case; to the contrary, they dealt with cases presenting several misrepresentations made on a single document, *United States* v. *Sue*, 586 F.2d 70, 71 (8th Cir. 1978); *United States* v. *Sahley*, 526 F.2d 913, 918 (5th Cir. 1976), or a set of misstatements so "interrelated" that "in the absence of any one of them, the 'false statement or report' was incomplete." *United States* v. *Canas*, 595 F.2d 73, 78 (1st Cir. 1979). The other Section 1014 cases mentioned in the petition simply are not on

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[4]Petitioner's suggestion (Pet. 21) that *Glanton* is inconsistent with *Williams* v. *United States*, 458 U.S. 279 (1982), is incorrect. *Williams* held only that a person who writes a check on his own account does not violate Section 1014 when the account contains insufficient funds to support the check, because such a check makes no "statement" concerning the drawer's bank balance. *Glanton*, in contrast, involved the forgery of another person's signature on a check.

point,[5] while the myriad remaining decisions cited by petitioner involve statutes other than Section 1014, and therefore shed no light on what Congress "desire[d] to make the unit of prosecution" under that provision. *Bell*, 349 U.S. at 83.

2. Petitioner's contention (Pet. 22-24) that the government violated the Jencks Act, 18 U.S.C. 3500, is equally flawed.[6] Petitioner maintains that he was not given notes of interviews of a key government witness conducted by an FBI agent and a prosecutor. In fact, however, the witness was not interviewed by the FBI (Tr. 243-244, 284-285), and there is no basis for petitioner's assertion that materials relating to such an interview exist. Similarly, while the prosecutor did speak to the witness, the prosecutor generated only "trial notes" for use during the proceedings (Tr. 244). Such notes, which are not "signed or otherwise adopted or approved" by the witness (18 U.S.C. 3500(e)(1)), plainly need not be produced under the Jencks Act. *Goldberg* v. *United States*, 425 U.S. 94, 105 (1976).

3. Finally, petitioner's factual contention (Pet. 24-26) that he was denied an opportunity to cross-examine a government witness effectively does not warrant review. The court of appeals noted in its unpublished opinion that petitioner was permitted to conduct a "vigorous and sustained" cross-examination of the witness and that petitioner's "proffered cross-examination did not directly relate to

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[5] *United States* v. *Pullen*, 721 F.2d 788 (11th Cir. 1983), does not address multiplicity at all. *United States* v. *Mangieri*, 694 F.2d 1270, 1282 (D.C. Cir. 1982), which rejected a defendant's claim of duplicity in the indictment, explicitly did not "foreclose the possibility that under some circumstances multiple misrepresentations might justify separate offenses."

[6] The court of appeals noted in its unpublished opinion that petitioner's Jencks Act claim was raised for the first time one week before oral argument, and therefore had not been brought to the court in a "timely fashion" (Pet. App. 9a).

[the witness's] credibility and could have misled and diverted the jury" (Pet. App. 9a). The district court's decision to limit cross-examination in these circumstances was well within its discretion. *Davis* v. *Alaska*, 415 U.S. 308, 316 (1974).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
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Attorney

OCTOBER 1984

DOJ-1984-10